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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. SHAWN RAMON ROGERS, Defendant and Appellant.	H026823 (Santa Clara County Super.Ct.No. CC062329)

After several shots were fired at people near San Jose State University, defendant was convicted of three counts of assault with a semiautomatic firearm and related enhancements. Defendant himself testified at trial, as did several character witnesses. His trial was presided over by a judge who was later disqualified from acting as a judge. Later, the sentencing judge refused defendant's request that he consider a statement by the disqualified trial judge indicating what sentence the trial judge would have imposed.

Defendant now claims the sentencing judge erred in refusing to consider this information as a statement in mitigation, in making other sentencing decisions, and in imposing the upper term in violation of *Blakely v. Washington* (2004) 542 U.S. ___ [124 S.Ct. 2531] (*Blakely*). We reject most claims of error, and affirm the judgment as modified.

STATEMENT OF PROCEDURE

On January 23, 2003, an information was filed against defendant Shawn Ramon Rogers, charging crimes committed on February 19, 2000. As amended, the information alleged: count 1—attempted premeditated murder against Kenneth Nears (Pen. Code, §§ 664/187);[1] count 2—attempted premeditated murder against Demitris Starks (§§ 664/187); count 3—assault with a semiautomatic firearm against Daniel Camarillo (§ 245, subd. (b)); count 4—possession of a concealed firearm which was loaded (§ 12025, subds. (a)(2), (b)(6)); count 5—possession of a loaded firearm which was concealable and not registered to defendant (§ 12031, subd. (a)(1), (a)(2)(F)). The information further alleged personal use of a firearm (former § 12022.5, subd. (a)(1)), personal discharge of a firearm (§ 12022.53, subd. (c)), possession of a firearm with a detachable magazine (§ 12021.5, subd. (b)), commission of the offenses in furtherance of a criminal street gang (§ 186.22, subd. (b)(1)), and personal infliction of great bodily injury as to Nears (§§ 12022.53, subd. (d), 12022.7, subd. (a), 1203, subd. (e)(3)).[2]

In April 2003, the jury found defendant not guilty of the attempted murder charges, but found him guilty of assault with a semiautomatic firearm in counts 1, 2, and 3, and guilty of the firearm possession offenses in counts 4 and 5. The jury found true allegations that defendant personally used a firearm in counts 1, 2, and 3, that he personally inflicted great bodily injury in count 1, and that he committed the crimes in furtherance of a criminal street gang in counts 1, 2, 4, and 5.

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[1] All further statutory references are to the Penal Code unless otherwise specified.

[2] Apparently, there was delay between the preliminary hearing and the filing of an information because of litigation in this case concerning Proposition 21, the initiative measure passed in the March 2000 election, effective March 8, 2000. This initiative, governing the treatment of juvenile offenders, included a provision allowing the prosecutor, in designated circumstances, to file charges directly in adult court.

By the time of the sentencing hearing in November 2003, the trial judge had been disqualified from acting as a judge, as the result of allegations of judicial misconduct unrelated to this case. Thus, a different judge presided at the hearing. The sentencing court conducted a lengthy sentencing hearing, including a statement by defendant and presentation of several character witnesses.

On November 13, 2003, the court imposed a prison sentence of 23 years. On count 1, the court imposed the upper term of nine years, plus the upper term of 10 years for the firearm enhancement, three years for inflicting great bodily injury, and one year for the gang enhancement. Sentences on the remaining counts were ordered to be served concurrently. In addition to various fines and fees, the court also required defendant to provide a blood sample for a DNA test pursuant to section 296.

Defendant timely appeals.

STATEMENT OF FACTS

Viewed in accordance with the usual rules on appeal (*People v. Osband* (1996) 13 Cal.4th 622, 690), the record shows: On the night of February 19, 2000, Kenneth Nears and Demitris Starks, both San Jose State University students, went to a fraternity party south of the campus. Outside the fraternity house, they saw an argument between several African American or Hispanic young men, including a young man, later identified as defendant, and two others. They overheard some gang-related references. Around midnight, Nears and Starks headed back along Eighth Street to their dormitory on campus. As they passed the corner of Eighth and William Streets, they saw the three people who had been involved in the earlier argument. One person asked what "set" they were from. Nears said he was from San Diego and Starks said he was from San Jose.

Starks turned to walk backwards so he could see the three. He heard defendant, whom he recognized from his high school, say "Fuck slobs." Then Starks saw defendant reach into his pants and take out what he believed was a gun. Starks turned and ran. Nears also heard someone say, "Fuck slobs," and, as the three men moved toward him

and Starks, he saw defendant fire a gun. As he ran towards his dormitory, he heard shots, and realized he had been hit in the knee. Nears required medical treatment. A bullet went through Starks' pants leg, but he was not wounded.

At the same time, Daniel Camarillo was at Eighth and William, driving his car out of a parking space. He saw two men running toward his car and heard gunshots. A bullet hit his car and he quickly drove away. Camarillo reported the incident to a police officer in the next block, and they returned to the area where the shots were fired. Although Camarillo remembered passing three men on the way to his car, he was not asked to identify anyone the night of the shootings, and he could not identify anyone in court.

Starks had recognized defendant as someone he knew from high school, and he gave the police defendant's name. He remembered that defendant "hung around" with the Seven Trees Crips gang. Nears that night, identified defendant as the shooter, although he could not identify him in court.

The police located defendant at the home of Derek Gaines, and searched Gaines' room with permission. In the room, the police found gang-related graffiti, and other items, including a notebook and clothing, signifying Seven Trees Crips. They also found a green gym bag, which defendant claimed was his. Inside the gym bag rolled up in some clothes was an operable semi-automatic .380 caliber handgun with a detachable magazine. This weapon was later identified by a firearms expert as the weapon fired at Eighth and William Streets.

Defendant and Gaines both identified themselves as members of the Seven Trees Crips, and sported similar tattoos. They were arrested and transported to the police department, where they were placed in a bugged room. In their surreptitiously recorded conversation, Gaines told defendant: " 'You didn't hit nobody, you didn't shoot none of them.' "

A gang expert testified at trial about gang behavior in general, and the Seven Trees Crips specifically. The expert testified that gangs committed crimes to enhance their ability to intimidate and to gain or hold territorial control. He testified that the Seven Trees Crips gang had participated in one or more of the crimes listed in section 186.22, subdivision (e). He also opined that defendant was a member of the Seven Trees Crips and that the crime had been committed for the benefit of the gang. He noted that asking a person what set he was from was a form of challenge in gang culture, with the wrong answer resulting in an immediate assaultive response.

At trial, defendant testified on his own behalf and also presented several character witnesses. Defendant admitted that, on the night of the crime, he was 17 years old and was on an overnight pass from a commitment to the juvenile ranch. He met up with Derek Gaines and another friend, Carlos, at his girlfriend's house. The three then left to go to a party near San Jose State. Defendant testified that Derek unexpectedly pulled a gun and began firing at two men on the street. He said that he went along with Gaines in the conversation taped at the police department in an attempt to protect Gaines who had threatened him. Defendant denied gang membership, and explained that when he was younger he had been threatened and pressured to join a gang, so he paid Gaines, a gang member, for protection. He explained that his prior crime of embezzlement had been at Gaines' request, and that he only identified himself as a gang member to police or others for self-protection.

A juvenile hall teacher and a social services worker both testified on defendant's behalf. They praised defendant as an excellent, published writer, who had become academically motivated since being in juvenile hall. They also acknowledged him as a positive role model for other juveniles, and denied knowing of any gang connections.

DISCUSSION

I

Failure to Consider Mitigating Circumstances

Background

Judge William R. Danser presided over defendant's trial in April 2003. After trial, but before sentencing, Danser was disqualified from acting as a judge, as the result of incidents unrelated to this case. The case was transferred to Judge Kevin J. Murphy for sentencing. Apparently, during the trial, defendant and Judge Danser had an ex parte discussion about a possible settlement of the case.[3] The prosecutor consented to not being present.

On November 6, 2003, at the first post-trial proceeding, Judge Murphy acknowledged the difficulties of changing judges, and offered to accommodate defendant with ample time to prepare, and ample hearing time to present witnesses or other evidence. Defense counsel raised the issue of Judge Murphy consulting with Judge Danser. Judge Murphy expressed serious concerns that, under his current disqualification, Judge Danser was required to refrain from any judicial activity.

At the formal sentencing hearing on November 16, 2003, defense counsel informed Judge Murphy that recently he had had another ex parte conversation with Judge Danser about the sentence Judge Danser would have imposed.[4] The prosecutor objected to this ex parte communication. Judge Murphy refused to read the written account of the conversation or to consider any material that contained references to this communication. Judge Murphy expressed concerns that the district attorney's office was

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[3] According to defense counsel, Judge Danser was impressed with defendant's prospects for the future, and tried to convince defendant to accept an offer for a determinate sentence, explaining that a life term would be required if defendant were convicted of attempted premeditated murder.

[4] Apparently this conversation was arranged through Judge Danser's attorney and with the approval of defense counsel's supervisors in the public defender's office.

also prosecuting Judge Danser, and therefore the prosecutor could not be part of any communication with him in connection with this case. Judge Murphy concluded that, in fairness, he could not consider the statement attributed to Judge Danser.

Analysis

Defendant argues that, because all relevant evidence is admissible unless the exclusion of such evidence is permitted by law (see Evid. Code, § 351), he had the right to present a statement reflecting Judge Danser's view on sentencing as a statement in mitigation. He points to several statements by the United States Supreme Court, such as, a sentencing judge "may, consistently with the Due Process Clause of the Fourteenth Amendment, consider responsible unsworn or 'out-of-court' information relative to the circumstances of the crime and to the convicted person's life and characteristics." (*Williams v. Oklahoma* (1959) 358 U.S. 576, 584.) Also, a sentencing court should consider relevant evidence from those with information that would be helpful in the court's exercise of its sentencing discretion, even if the information is in the form of extrajudicial statements, so long as it is reliable. (*Williams v. New York* (1949) 337 U.S. 241, 246-247.) The California Supreme Court has acknowledged the defendant's right to present to the sentencing court evidence relevant to the decision of what punishment to impose. (*People v. Peterson* (1973) 9 Cal.3d 717, 724-730.)

Defendant also maintains that, although a trial court has broad discretion in determining the relevance of evidence (*People v. Scheid* (1997) 16 Cal.4th 1, 14), "an erroneous understanding by the trial court of its discretionary power is not a true exercise of discretion." (*People v. Marquez* (1983) 143 Cal.App.3d 797, 803.) Moreover, "[d]efendants are entitled to sentencing decisions made in the exercise of the 'informed discretion' of the sentencing court." (*People v. Belmontes* (1983) 34 Cal.3d 335, 348, fn. 8.)

According to defendant, Judge Danser's comments on the appropriate sentence for defendant were relevant and reliable, because he presided over the trial and because he

had many years of experience in assessing criminal cases and properly exercising sentencing discretion. Defendant insists that Judge Danser's comments should be treated just like those of a regular citizen with important information to contribute about defendant.

Defendant was not seeking the comments of Judge Danser, however, as a regular citizen, possibly someone who had known defendant or had interacted with him outside of his judicial role. The Attorney General asserts that: "Judge Danser could only comment on [defendant's] sentence because of his knowledge of the case over which he had presided as a judge. Therefore, his opinion was a *judicial opinion* and giving it was a judicial action. Judge Danser's opinion was given in violation of the suspension rule that he not engage in any conduct 'acting as a judge.' Thus, to have considered Judge Danser's comments would have been in direct conflict with the state Constitution." We agree that any comments by Judge Danser would have been an opinion based on his judicial role, not as a regular citizen, and Judge Murphy correctly declined to consider such opinion.

Defendant further complains that, because there was such strong disagreement over the appropriate sentence in this case, he was greatly prejudiced by Judge Murphy's refusal to consider Judge Danser's opinion. The probation department recommended a sentence of 16 years and defendant agreed. But the prosecutor advocated a sentence of over 30 years. We note that Judge Murphy allowed defendant to make a statement and listened carefully to defendant's character witnesses, some of whom had testified at trial, and to another juvenile and his mother who credited defendant with saving his life.

In finding the appropriate sentence to be 23 years, Judge Murphy as the sentencing court stated, in part: "This is a very difficult case for me because I was not the trial judge. And one of the things I attempted to accomplish is to preside over a hearing where everyone had the opportunity to say whatever they wanted to say and present whatever information that they felt was appropriate." "I have considered everything, the

seriousness of the crimes. I've listened carefully to the character witnesses. . . . [T]hey come in and tell me that this person is different. So all of that has to be factored in. [¶] And, yes, his age does have to be factored in. . . . [¶] I don't agree with the probation department's recommendation, but I don't agree with the People's recommendation either, . . . We have to exercise our independent judgment. . . . [A]ggravating factors, include the vulnerability of the victims as much as that they were not armed, the overall conduct of the defendant, which indicates, at least as it relates to the facts of this case, that he does pose or did pose a danger to society, namely, that he shot two individuals on a public street because of the apparent motivation that they were gang members. That the defendant was on probation at the time of the offense. So those are aggravating factors. [¶] I find the aggravating factors outweigh the mitigating factors. And I find this with reference to count 1, the most serious count. And also I'm going to factor in that there are counts where consecutive sentencing could be imposed where I am not going to impose consecutive sentencing."

The transcript of the entire sentencing hearing reflects thoughtful consideration of all the evidence by the sentencing judge. We find no abuse of discretion in his refusal to consider the suspended trial judge's statement or in the sentence imposed.

II
Penal Code Section 654

The jury convicted defendant of three counts of assault with a semiautomatic firearm (counts 1, 2, 3), possession of a concealed firearm (count 4), and possession of a loaded firearm (count 5). The court then sentenced defendant to the upper term of nine years on count 1 (plus enhancements) as well as to concurrent two-year terms on counts 4 and 5. (Counts 2 and 3 were punished with concurrent sentences as well.) Defendant now argues that the sentence on count 4 or count 5 or both must be stayed pursuant to section 654.

Section 654, subdivision (a), provides: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." It is well established that section 654 precludes double punishment for crimes which were committed during an indivisible course of conduct and which were incident to a single intent and objective. "'Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the *intent and objective* of the actor. If all of the offenses were incident to one objective, the defendant may be punished . . . not for more than one [of the offenses].' [Citation]" (*People v. Latimer* (1993) 5 Cal.4th 1203, 1208, quoting *Neal v. State of California* (1960) 55 Cal.2d 11, 19.) It is also well established that the imposition of a concurrent sentence constitutes double punishment prohibited by section 654. (*People v. Deloza* (1998) 18 Cal.4th 585, 594.)

In *People v. Harrison* (1989) 48 Cal.3d 321, the Supreme Court explained: "[B]ecause the statute is intended to ensure that defendant is punished 'commensurate with his culpability' [citation], its protection has been extended to cases in which there are several offenses committed during 'a course of conduct deemed to be indivisible in time.' [Citation.] [¶] It is defendant's intent and objective, not the temporal proximity of his offenses, which determine whether the transaction is indivisible. [Citations.] We have traditionally observed that if all of the offenses were merely incidental to, or were the means of accomplishing or facilitating one objective, defendant may be found to have harbored a single intent and therefore may be punished only once. [Citation.] [¶] If, on the other hand, defendant harbored 'multiple criminal objectives,' which were independent of and not merely incidental to each other, he may be punished for each statutory violation committed in pursuit of each objective, 'even though the violations shared common acts or were parts of an otherwise indivisible course of conduct.' [Citation.] Although the question of whether defendant harbored a 'single intent' within

the meaning of section 654 is generally a factual one, the applicability of the statute to conceded facts is a question of law. [Citation.]" (*People v. Harrison, supra,* at p. 335.)

"Whether section 654 applies in a given case is a question of fact for the trial court, which is vested with broad latitude in making its determination. [Citations.] Its findings will not be reversed on appeal if there is any substantial evidence to support them. [Citations.] We review the trial court's determination in the light most favorable to the respondent and presume the existence of every fact the trial court could reasonably deduce from the evidence." (*People v. Jones* (2002) 103 Cal.App.4th 1139, 1143 (*Jones*).)

In *People v. Bradford* (1976) 17 Cal.3d 8, 22, the Supreme Court reiterated the standard for applying section 654 in comparable circumstances (assault with a deadly weapon upon a peace officer and possession of a concealable firearm by an ex-felon): " 'Whether a violation of section 12021, forbidding persons convicted of felonies from possessing firearms concealable upon the person, constitutes a divisible transaction from the offense in which he employs the weapon depends upon the facts and evidence of each individual case. Thus where the evidence shows a possession distinctly antecedent and separate from the primary offense, punishment on both crimes has been approved. On the other hand, where the evidence shows a possession only in conjunction with the primary offense, then punishment for the illegal possession of the firearm has been held to be improper where it is the lesser offense.' [Citation.]" In *Bradford*, the defendant and an accomplice robbed a bank, but were stopped for speeding. As the defendant stepped to the patrol car, he wrested the officer's revolver from him. When the officer was accidentally struck by another car and pinned under it, the defendant shot at him. The court concluded that the defendant's possession of the officer's revolver was not antecedent and separate from his use of the revolver in assaulting the officer, and thus the punishment on the lesser count must be stayed.

The Attorney General insists that the circumstantial evidence shows that defendant here made three separate decisions: a decision to transport the gun in the car from wherever he got it to the area of the incident, a decision to conceal the gun on his person (not leave it in the car), and then a decision to use the gun in the assault. The Attorney General concludes: "Each act was a completed crime before the intent to do the next was formed. Each act may be separately punished." However, we note the observation of the court in *People v. Lopez* (2004) 119 Cal.App.4th 132, 138: "In resolving section 654 issues, our California Supreme Court has recently stated that the appellate courts should not 'parse[] the objectives too finely.' (*People v. Britt* [2004] 32 Cal.4th [944,] 953.)" We agree.

With regard to count 4 (possession of a concealed weapon), one victim (Starks) saw defendant reach into his pants and pull out the gun, and then fire it. The implication is that defendant had a loaded firearm concealed in his pants for at least some amount of time before he decided to shoot at Starks and Nears as they walked by. However, as to count 5 (possession of a loaded weapon in a public place), the Attorney General has cited little specific evidence in the record of defendant having possession or control over the *loaded* gun before the shooting incident or after, independent of the decision to conceal, and the decision to shoot, the gun. The record reflects only that the gun was found in Derek Gaines' room in defendant's gym bag after the shooting, and there was no evidence the gun was loaded at that time. We find no evidence to support the Attorney General's speculation that defendant must have transported the gun in the car. Defendant testified that he was at several houses or locations in the general neighborhood before the shooting incident.

As the court in *People v. Ratcliff* (1990) 223 Cal.App.3d 1401, 1412, explained: "From *Bradford* and *Venegas*, we distill the principle that if the evidence demonstrates at most that fortuitous circumstances put the firearm in the defendant's hand only at the instant of committing another offense, section 654 will bar a separate punishment for the

possession of the weapon by an ex-felon." On the other hand, the court in *Jones* concluded that "section 654 is inapplicable when the evidence shows that the defendant arrived at the scene of his or her primary crime already in possession of the firearm." (*Jones, supra,* 103 Cal.App.4th at p. 1145.)

Giving due deference to the trial court's implied findings that each of the offenses here demonstrated a separate intent and objective, we find substantial evidence to support the implied finding that defendant concealed the gun before he shot at the victims; he did not fortuitously happen on it at the instant of the shooting. We conclude the record shows concealment of the gun "distinctly antecedent and separate from the primary offense," thus allowing separate punishment. (*People v. Bradford, supra,* 17 Cal.3d at p. 22.)

However, we find insufficient evidence in the record to support separate punishments on both count 4 (possession of a concealed weapon) and count 5 (possession of a loaded weapon in a public place).[5] Although the gun was found in defendant's gym bag in Gaines' room, there was no evidence at that point the gun was loaded or ammunition was present.

In *People v. Hurtado* (1996) 47 Cal.App.4th 805, 816, we concluded as conceded by the Attorney General that an additional sentence for carrying a loaded weapon should have been stayed where the defendant was convicted of both carrying a concealed weapon and carrying a loaded weapon, but no other weapons possession offenses. (See also *In re Joseph G.* (1995) 32 Cal.App.4th 1735 [authorities saw juvenile place backpack in locker and found loaded weapon in backpack; could only be sentenced on greater of three offenses, each based on same act of carrying a loaded firearm].)

We conclude the punishment on count 5 must be stayed.

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[5] The probation report recommended a concurrent sentence on count 4 and a stayed sentence on count 5.

III
Required DNA Testing

Defendant next contends that the trial court order requiring him to submit to DNA testing under section 296[6] for inclusion in the State's convicted offender DNA database violates his Fourth Amendment rights.[7] Defendant argues that, even as a state prisoner, he has a reasonable expectation of privacy, and that the DNA database program is not designed to serve "special needs," beyond the normal need for law enforcement, which could justify a departure from the general Fourth Amendment requirement of individualized suspicion.

"It is not disputed that the nonconsensual extraction of blood is an invasion of the rights protected by the Fourth Amendment of the United States Constitution. It also is true that even less intrusive methods of collecting samples, and the ensuing chemical analysis of such samples to obtain physiological data, implicate Fourth Amendment privacy interests. [Citations.] . . . '[However,] the Fourth Amendment does not proscribe all searches and seizures, but only those that are unreasonable.' [Citation.]" (*People v. King* (2000) 82 Cal.App.4th 1363, 1370-1371 (*King*), fn. omitted.)

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[6] Section 296, subdivision (a)(1) provides, in pertinent part, that "[a]ny person who is convicted of any of the following crimes [including assault with a deadly weapon in violation of section 245], . . shall, regardless of sentence imposed or disposition rendered, be required to provide two specimens of blood, a saliva sample, right thumbprints, and a full palm print impression of each hand for law enforcement identification analysis."

[7] Defendant admits he did not object to this condition in the trial court, but asserts that the claim is cognizable on appeal because it involves a pure issue of law, which rests on undisputed facts. (See *People v. Yeoman* (2003) 31 Cal.4th 93, 118.) We may also "examine constitutional issues raised for the first time on appeal, especially when enforcement of a penal statute is involved." (*People v. Marchand* (2002) 98 Cal.App.4th 1056, 1061.) The Attorney General does not object.

In the recent case of *People v. Adams* (2004) 115 Cal.App.4th 243, this court agreed with the analysis in *King* and rejected a similar challenge to the DNA and Forensic Identification Data Base and Data Bank Act of 1998, set out in section 295 et seq. The court in *King* set forth the balancing test to evaluate the reasonableness of a search: "As a general rule, the question of whether a particular practice is unreasonable, and thus violates the Fourth Amendment, ' "is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." ' [Citations.] 'Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted.' [Citation.]" (*King, supra,* 82 Cal.App.4th at p. 1371.)

In *Adams*, we quoted from a similar decision in *Alfaro v. Terhune* (2002) 98 Cal.App.4th 492 (*Alfaro*), which also held that collection of blood samples for the DNA database program does not violate the Fourth Amendment. " 'In view of the thoroughness with which constitutional challenges to DNA [database] and data bank acts have been discussed, there is little we would venture to add. We agree with existing authorities that (1) nonconsensual extraction of biological samples for identification purposes does implicate constitutional interests; (2) those convicted of serious crimes have a diminished expectation of privacy [which specifically extends to the person's identity (*King, supra,* 82 Cal.App.4th at p. 1374)] and the intrusions authorized by the Act are minimal; and (3) the Act serves compelling governmental interests. Not the least of the governmental interests served by the Act is 'the overwhelming public interest in prosecuting crimes *accurately*.' [Citation.] A minimally intrusive methodology that can serve to avoid erroneous convictions and to bring to light and rectify erroneous convictions that have occurred manifestly serves a compelling public interest. We agree with the decisional authorities that have gone before and conclude that the balance must be struck in favor of the validity of the Act. (*Alfaro, supra,* 98 Cal.App.4th at pp. 505-506.)" (*Adams, supra,* 115 Cal.App.4th at pp. 257-258.)

Defendant here criticizes our decision in *Adams* for resting on the false premise that convicted criminals do not enjoy the same expectations of privacy. (*Adams, supra,* 115 Cal.App.4th at p. 258.) But clearly they do not. "[I]mprisonment carries with it the circumscription or loss of many significant rights." (*Hudson v. Palmer* (1984) 468 U.S. 517, 524.) "The reduction in a convicted person's reasonable expectation of privacy specifically extends to that person's identity. . . . By their commissions of a crime and subsequent convictions, persons such as appellant have forfeited any legitimate expectation of privacy in their identities. In short, any argument that Fourth Amendment privacy interests do not prohibit gathering information concerning identity from the person of one who has been convicted of a serious crime, or of retaining that information for crime enforcement purposes, is an argument that long ago was resolved in favor of the government." (*King, supra,* 82 Cal.App.4th at pp. 1374-1375, fn. omitted; see also *United States v. Kincade* (9th Cir. 2004) 379 F.3d 813, 820 [traditional assessment of reasonableness as gauged by the totality of the circumstances has approved compulsory DNA profiling].)

We find that the requirement that defendant submit to DNA testing pursuant to section 296 does not violate the Fourth Amendment's prohibition against unreasonable searches.

IV

Sentencing Error under Blakely

Seven months after defendant was sentenced, the United States Supreme Court in *Blakely, supra,* 542 U.S. ___ [124 S.Ct. 2531], held it was a denial of due process under the federal constitution to impose a sentence greater than the " 'prescribed statutory maximum' " based on any fact, other than a prior conviction or a fact admitted by the defendant, which has not been " 'submitted to a jury, and proved beyond a reasonable doubt.' " (*Id.*, at p. ___ [124 S.Ct. at p. 2536].) By supplemental brief, defendant contends that his sentence must be reversed for *Blakely* error. He claims that the *Blakely*

rule was violated here because the trial court imposed the upper term on the basis of aggravating factors not found by the jury.[8]

Defendant was convicted in count 1 of assault with a firearm, with true findings on the allegations that he personally used a firearm, personally inflicted great bodily injury and committed the crime in furtherance of a criminal street gang. The sentencing court imposed the upper term of nine years for the underlying crime and the upper term of ten years for the firearm enhancement, as well as three years for the great bodily injury enhancement and one year for the gang enhancement.[9] The court imposed the upper terms after finding three factors in aggravation:[10] the victim was vulnerable (California Rules of Court, rule 4.421(a)(3)),[11] the defendant's conduct indicated a danger to society (rule 4.421(b)(1)), and the defendant was on (juvenile) probation when the crime was committed (rule 4.421(b)(4)). These factors were not specifically presented to the jury nor found true beyond a reasonable doubt. The trial court also stated on the record, "I'm going to factor in that there are counts where consecutive sentencing could be imposed where I am not going to impose consecutive sentencing."

First, we respond to the Attorney General's claim that defendant has failed to preserve an objection under *Blakely* because he raised no similar objection in the trial

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[8] The question of whether *Blakely* precludes a trial court from making findings on aggravating facts in support of an upper term sentence is currently under review by the California Supreme Court. (*People v. Towne*, review granted July 14, 2004, S125677; *People v. Black*, review granted July 28, 2004, S126182.) Review has also been granted in numerous other cases to await decisions in *Towne* and *Black*.

[9] Punishment for the other counts was to be served concurrently.

[10] The trial court noted defendant's age as a factor in mitigation. The court also pointed to the fact that the jury had concluded the defendant did not have the specific intent to kill, in that the jury did not find defendant guilty of attempted murder, as charged. The court also acknowledged the strength of the testimony of defendant's character witnesses, and commented on defendant's intelligence and great potential.

[11] Further rule references are to the California Rules of Court.

court. Defendant insists that such an objection cannot be forfeited because, under controlling precedent, an objection on a ground such as right to a jury trial on aggravating factors, would have been futile. (See *People v. Welch* (1993) 5 Cal.4th 228, 237-238.) We agree, and conclude that it was reasonable for a defense attorney not to object at sentencing that the court could rely only on facts found by the jury beyond a reasonable doubt. The holding of *Blakely* was sufficiently unforeseeable that we find no forfeiture due to defendant's failure to object at sentencing. (See *People v. Jaffe* (2004) 122 Cal.App.4th 1559, 1583.)

In *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*), the United States Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Id.* at p. 490.) In *Blakely*, the Supreme Court concluded "that the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.* [Citations.] In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." (*Blakely, supra,* 542 U.S. at p. ___, 124 S.Ct. at p. 2537.)

The basic teaching of *Apprendi* and *Blakely*, as already explicated by numerous California cases, is that, with certain exceptions, the state cannot constitutionally subject a defendant to punishment exceeding that to which he is exposed by virtue of the facts found by a jury. This does not mean the court can only consider facts found by the jury, but rather those facts fix the maximum sentence the court can impose. The *Apprendi-Blakely* rule prevents only the imposition of a punishment greater than could have been imposed based on the facts reflected in the verdict, with two exceptions: the fact of a prior conviction (*Apprendi, supra,* 530 U.S. at pp. 466-467) and facts admitted by the defendant (*Blakely, supra,* 542 U.S. at p. ___ [124 S.Ct. at p. 2537]).

Recently, in *Jaffe*, after an extensive review of United States Supreme Court precedent, as well as California Supreme Court cases, we concluded that "under *Blakely*, the midterm is the relevant statutory maximum in the absence of 'the fact of a prior conviction,' the jury's finding of an aggravating factor, or the defendant's admission of one. [Citations.] However, . . . the upper term is the relevant statutory maximum if the jury finds an aggravating factor, the defendant admits one, or the fact of a prior conviction permits an upper term sentence." (*Jaffe, supra,* 122 Cal.App.4th at p. 1584, fn. omitted.)

We thus must determine what the statutory maximum in the present case is, where "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." (*Blakely, supra,* 542 U.S. at p. ___, [124 S.Ct. at p. 2537].) Under California law, once a jury finds or the defendant admits the existence of a single aggravating factor, the maximum sentence a judge may impose is the upper term. (§ 1170, subd. (b); *People v. Osband, supra,* 13 Cal.4th 622, 730.) Of course, the ultimate sentence may represent a weighing and balancing of a variety of aggravating and mitigating factors. (See rule 4.420(b).) However, *Blakely's* calculus requires ascertaining the potential statutory maximum available according to the jury's findings and the defendant's admissions. As footnote 19 of *Apprendi* explained, there is no problem with the sentencing judge considering additional facts not found by the jury so long as the resulting sentence is within the range established by the jury's findings and the defendant's admissions. (*Apprendi, supra,* 530 U.S. at p. 494, fn. 19.)

In the present case, although defendant was convicted of several counts, the trial judge imposed concurrent, rather than consecutive, terms on all but the first count, and imposed the upper term on count 1 and its enhancements. Under California's determinate sentencing law, the sentencing court makes the decision whether to impose a

consecutive or concurrent term (§ 669), and the usual consecutive sentence is one-third of the middle term for the second offense (§ 1170.1, subd. (a)).

California Rules of Court list a number of factors relevant to determining whether a sentence should be concurrent or consecutive. One of those factors relevant here is whether the crimes involved "separate acts of violence or threats of violence." (Rule 4.425(a)(2).) "[E]ven though a defendant entertains but a single principal objective during an indivisible course of conduct, he may be convicted and punished for each crime of violence committed against a different victim." (*People v. Ramos* (1982) 30 Cal.3d 553, 587, revd. on other grounds in *California v. Ramos* (1983) 463 U.S. 992.) Or, as this court previously stated in *People v. Leung* (1992) 5 Cal.App.4th 482, 504: "In choosing between consecutive and concurrent terms, the court must decide whether the particular circumstance at issue renders the collective group of offenses distinctively worse than the group of offenses would be were that circumstance not present. [¶] . . . [¶] We believe that multiple offenses committed against multiple individuals are distinctively worse than multiple offenses committed against a single individual." (See also *People v. Valenzuela* (1995) 40 Cal.App.4th 358, 365 [even though multiple victims factor was deleted from former rules 421 and 425, its use is appropriate where both husband and wife were killed by drunk driver].) In the present case, we believe the trial court could have validly sentenced defendant to consecutive terms based on the three different victims.[12]

The Supreme Court concisely explained the sentencing procedure for consecutive terms and enhancements in *People v. Felix* (2000) 22 Cal.4th 651, 655: "Under the [Determinate Sentencing Act], if a defendant is convicted of more than one offense carrying a determinate term, and the trial court imposes consecutive sentences, the term with the longest sentence is the 'principal term'; any term consecutive to the principal

[12] The revised probation report recommended lower term consecutive sentences.

term is a 'subordinate term.' (§ 1170.1, subd. (a).) The court imposes the full term, either lower, middle, or upper, for the principal term. However, in general (there are exceptions), the court imposes only 'one-third of the middle term' for subordinate terms. (*Ibid*.) A determinate term for a given offense might also be lengthened by sentence enhancements. Typical is the enhancement imposed in this case for firearm use. Section 12022.5, subdivision (a)(1), provides that 'any person who personally uses a firearm' while committing the offense shall receive an additional term of '3, 4, or 10 years.' The full term for the enhancement is added to the principal term. Enhancements are excluded from subordinate terms for felonies not defined as 'violent' under section 667.5, subdivision (c). Enhancements are added to subordinate terms for 'violent' felonies, but they can be only 'one-third of the term.' (§ 1170.1, subd. (a); see also 1170.11.)" (Fn. omitted.)

Here, the maximum sentence the trial court could have imposed if the middle terms were run consecutively with requisite enhancements would be 23 years.[13]

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[13] Pursuant to sections 1170.1 and 667.5, subdivision (c)(8) as effective in February 2000, the sentence would be calculated as follows: Each assault with a firearm count is punishable by a six-year middle term. (§ 245, subd. (b).) The personal use of a firearm enhancement carries a four-year middle term, full and consecutive. (§ 12022.5, subds. (a)(1), (d).) The great bodily injury enhancement has a set term of three years, full and consecutive. (§ 12022.7, subd. (a).) The gang enhancement carries a two-year middle term, and may be consecutive. (§ 186.22, subd. (b)(1).) Thus, for count 1, the middle term would be six plus four plus three plus two years for a total of 15 years. Count 2, served consecutively for a separate victim, at one-third the midterms (§§ 1170.1, 667.5, subd. (c)(8)) would be two (§ 245, subd. (b)) plus one and one-third (§ 12022.5) plus two-thirds (§ 186.22, subd. (b)(1)), for a total of four years. Count 3, served consecutively for a third victim (Camarillo) at one-third midterms (§§ 1170.1, 667.5, subd. (c)(8)) would be two (§ 245, subd. (b)) plus one and one-third (§ 12022.5) for a total of three and one-third years. Count 4 (possession of concealed weapon) served consecutively at one-third the midterm is an additional eight months, or two-thirds of a year. The overall total, by these calculations, is 23 years.

In the present case, the jury did not find any of the three aggravating factors true. Nor was there any submission of or finding on the fact of a prior conviction. As to admissions by defendant, the only possible factor in aggravation relied on by the sentencing court was the fact that defendant was on probation when the current offenses took place. The record shows several references during defendant's testimony to his prior crime of embezzlement and his sentence to juvenile hall and then the ranch.[14]

Although it could be inferred that defendant was on a temporary release from his juvenile commitment, which might be equated with probation, we read *Blakely* and *Apprendi* to require more than a series of inferences to reliably use a defendant's "admission" to increase his punishment above the statutory maximum. Nor can we unhesitatingly equate a juvenile adjudication to the prior conviction permitted in *Blakely* and *Apprendi*.

In fact, the trial court could have sentenced defendant to consecutive mid terms, as described above, up to a statutory maximum of 23 years. Therefore, in imposing a sentence of additional terms concurrent to the upper terms on count 1 and its enhancements for a total of 23 years, the trial court did not violate the principles set forth in *Blakely*.

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[14] "Q. [Defense Counsel]. And you were convicted of embezzlement, correct? [¶] A. [Defendant]. Yes. [¶] Q. And that was when you were 16-years old then, is that—15? [¶] A. 16. [¶] Q. 16. And you were in the, you went to juvenile hall for that? [¶] A. I went to juvenile hall for a few months, then they sent me to the ranch. [¶] Q. Okay. And it was while you were at the ranch, serving time for the embezzlement offense, that this crime occurred? [¶] A. Yes."

"Q. . . . How much time did you get, by the way, for the embezzlement offense? [¶] A. I was sentenced to 90 days at the ranch. [¶] Q. 90 days. So it was during that time that apparently you were released; was this a temporary release, or what was that about? How did you get out? [¶] A. After you, after you do good for a certain amount of time, they let you go home on the weekends; from Friday night to Sunday night."

"Q [Prosecutor]. . . . [H]ow long had you been in juvenile hall before you were released? [¶] A. [Defendant]. Since November of '99."

As a final note, we acknowledge that the principles of *Blakely* may impact certain determinations under section 654. But at the present time, California law provides that such a determination is properly made by the trial court. (*People v. Osband, supra,* 13 Cal.4th at p. 730; see also *People v. Cleveland* (2001) 87 Cal.App.4th 263, 270 [§ 654 determination is not subject to *Apprendi*; may reduce defendant's term where applicable, but does not increase the statutory maximum where it does not apply].) The parties do not raise such an issue, and we need not consider it here.

DISPOSITION

The two-year concurrent sentence for count 5 is stayed pending finality of the judgment and service of sentence on count 1, such stay to become permanent upon completion of sentence as to count 1. The superior court is ordered to prepare an amended abstract of judgment to so show this modification and send it to the Department of Corrections. As so modified, the judgment is affirmed.

Walsh, J.*

WE CONCUR:

Rushing, P.J.

McAdams, J.

*Judge of the Santa Clara County Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.